

Pepsi-Cola Company and Teamsters Local Union No. 293 a/w International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 8-RC-15152

March 26, 1999

DECISION ON REVIEW AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On December 2, 1994, the Regional Director for Region 8 issued a Decision and Direction of Election in which he found appropriate the petitioned-for unit of account representatives at the Employer's Cleveland and Twinsburg, Ohio facilities, concluding that all but 2 of its 46 account representatives are not supervisors under Section 2(11) of the Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision asserting that all of its account representatives are statutory supervisors and, therefore, the petition should be dismissed.¹ By Order dated April 19, 1995, the Board granted the Employer's request for review.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the Employer's brief on review, we affirm the Regional Director's decision with respect to the two account representatives he found to be supervisors based on their authority to discharge merchandisers, and reverse the Regional Director's decision with respect to the 44 account representatives he found not to be statutory supervisors. Contrary to the Regional Director, we do not draw a distinction between those account representatives who have exercised the authority to discharge and those who have not, as all of the Employer's account representatives who have merchandisers assigned to them possess the same authority to discharge merchandisers. Consequently, we find that all account representatives who have merchandisers assigned to them are supervisors as defined in Section 2(11) of the Act.²

¹ Alternatively, the Employer asserted that if the Board agrees with the Regional Director that the 44 account representatives are not supervisors, then there is no valid reason for excluding the remaining two representatives from the election process.

² Our finding of supervisory status does not extend to those account representatives who do not have merchandisers assigned to them or their teams.

Members Fox and Brame find that the account representatives who have merchandisers assigned to them or their teams are statutory supervisors based on their authority to discharge the merchandisers. Accordingly, they find it unnecessary to pass on the Regional Director's findings with respect to the other indicia of supervisory authority alleged by the Employer. Member Hurtgen agrees that the account representatives are statutory supervisors based on their authority to discharge, and would also find supervisory status based on their authority to assign overtime work to the merchandisers and approve their requests for vacation and leave.

I. FACTS

The Employer manufactures, sells, and distributes soft drink products. The Employer's operations at its Twinsburg and Cleveland facilities are overseen by Market Unit Manager Lee Cox. Three territory development managers (TDMs) in Twinsburg report directly to Cox, while the six TDMs in Cleveland report to Tom Dugan, the unit manager, who in turn reports to Cox. The TDMs are responsible for managing all sales activities within a specific geographic area. The account representatives report to the TDMs in each geographic area.³

Account representatives are responsible for the bulk accounts. They work in teams of two and most, if not all, of the teams have one or more merchandisers either assigned to the team or assigned to a specific account representative.⁴ Account representatives are responsible for making sales calls, stocking shelves, ordering products, handling promotions, maintaining stock rooms in stores, and "supervising" the merchandisers. Account representatives are salaried employees and are covered by the Employer's benefit plan for salaried employees.

Merchandisers are part-time employees who assist with the physical portion of the job by stocking and shelving merchandise and organizing the stock rooms. Merchandisers, unlike account representatives, are hourly paid and do not receive any benefits. Account representatives spend anywhere from 60 to 90 percent of their time performing many of the same tasks as the merchandisers. Sometimes, account representatives work side-by-side with their merchandisers.

Account representatives are responsible for their individual (or team) accounts and are told that they "own" their accounts. The TDMs advise each account representative of the total merchandiser hours he or she is allotted each week, and the account representatives independently determine how to allocate those hours among the merchandisers assigned to them. Account representatives determine which customer accounts will be serviced, assign merchandisers to specific accounts, and assign the merchandisers the number of hours they are to work. Account representatives do not possess the authority, on their own, to hire merchandisers for permanent positions, although some have participated in the hiring process.

With respect to the authority of account representatives to discharge merchandisers, the record shows that in one instance, Account Representative Schulte informed TDM Barta that he needed to "get rid of" a merchandiser because of attendance and attitude problems. Barta testified that he replied that Schulte "owns that merchan-

³ There are approximately 46 account representatives; 30 report to the TDMs in Cleveland and 16 report to the TDMs in Twinsburg.

⁴ There are 35 merchandisers who work in Cleveland, while 15 work in Twinsburg. Not every account representative has a merchandiser assigned to his or her team. The exact number of account representatives without an assigned merchandiser is not revealed by the record.

diser” and that it was Schulte’s decision “to do what he needed to do.” On a second occasion in which Schulte spoke to Barta about terminating merchandiser Robinson, Barta again responded that it was Schulte’s decision, and if Schulte felt that Robinson was not meeting expectations, then Schulte needed to terminate Robinson. Schulte also informed Barta that he could not trust merchandiser McCarthy to accomplish anything unless Schulte worked with him. Again, Barta told Schulte that whether to retain McCarthy was Schulte’s decision. Schulte ultimately terminated both Robinson and McCarthy. Barta further testified that the account representatives did not have to obtain his approval to terminate merchandisers, and that he had not asked the account representatives to notify him before they terminated a merchandiser; the fact that Schulte had contacted him before terminating his merchandisers was just a formality, something Schulte “did on his own.”

Account Representative Murphy testified that he suspected that one of his merchandisers was calling in more hours than he worked. After ascertaining that the merchandiser had been lying, Murphy reported this to his TDM. The TDM told Murphy that this was grounds for dismissal and that Murphy was free to “let him go.” Murphy declined to terminate the merchandiser at that time because the merchandiser was needed, instead terminating him several months later. Murphy advised the TDM only after the discharge. Murphy also testified that he has reduced merchandisers’ hours if there are problems, and that he has scheduled merchandisers for additional hours to reward them for doing a better job.

The Regional Director found Account Representatives Murphy and Schulte to be statutory supervisors based on their authority to effectively recommend the discharge of merchandisers. The Regional Director further found, however, that the remaining account representatives, with or without assigned merchandisers, are not statutory supervisors because there were no specific examples that any of them exercised similar authority to discharge merchandisers.

The Employer asserts that its account representatives are statutory supervisors because, inter alia, they possess the authority to terminate merchandisers. The Employer also argues, contrary to the Regional Director, that if two of the account representatives are found to be statutory supervisors, then the remaining account representatives must also be found to be statutory supervisors, as all account representatives possess the same authority.

II. ANALYSIS AND CONCLUSIONS

“Supervisor” is defined in Section 2(11) of the Act as

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such ac-

tion, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

“The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner.” *Union Square Theatre Management*, 326 NLRB 70 (1998).⁵

We conclude that the Employer’s account representatives are statutory supervisors based on their authority to discharge the merchandisers assigned to them. As noted above, Account Representatives Murphy and Schulte each discharged one or more merchandisers for various reasons such as calling in more hours than worked and failure to perform up to expectations. The record establishes that the account representatives’ exercise of their authority to discharge the merchandisers is neither routine nor clerical in nature, but involves the use of independent judgment. Indeed, we note that the account representatives have complete discretion, within the Employer’s general performance guidelines,⁶ to make decisions regarding termination. Account representatives are not required to obtain prior approval from a TDM or any high manager prior to terminating a merchandiser. When Account Representative Schulte called TDM Barta to talk about his merchandisers, Barta repeatedly told Schulte that he “owned the accounts” and that the decision to terminate his merchandiser was Schulte’s. Further, the uncontradicted testimony establishes that the account representatives were under no obligation even to notify their TDM prior to discharging a merchandiser. Finally, there is no evidence that any of the termination decisions made by the account representatives have been or will be independently investigated or reviewed by higher management.⁷

The fact that the account representatives exercise their authority over employees who are not included in the bargaining unit does not preclude the Board from finding the account representatives to be statutory supervisors. Where the performance of supervisory functions is “part and parcel of the individual’s primary work product rather than an ancillary part of their duties,” the Board has found individuals to be statutory supervisors although they exercise such authority over nonunit personnel.⁸ In *Union Square*, supra, at 72 the Board found

⁵ Member Brame notes that in citing *Union Square* for this proposition and for the other propositions for which it is cited in this decision (supra), he does not thereby necessarily indicate his support for that case in all respects.

⁶ The testimony establishes that the Employer has guidelines for work performance and expectations. Account representatives may terminate merchandisers within these guidelines, which prohibit termination based on such factors as sex, racial characteristics, ethnic characteristics, etc.

⁷ Compare: *Passavant Health Center*, 284 NLRB 887, 889 (1987).

⁸ See, e.g., *Union Square Theatre Management*, supra; *Rite Aid Corp.*, 325 NLRB 717 (1998).

technical directors to be statutory supervisors because, inter alia, they “were hired not just to do minor maintenance and repair work themselves, but also with the specific understanding that they would be responsible, in the interests of the employer, for recruiting and hiring casual employees as needed to perform more extensive or more complicated maintenance projects.” Those casual employees were hired not just to do work that was “adjunct to” that of the technical directors, but to work on projects which were separate from, and in addition to, those performed by the technical directors themselves.

Similarly, the Employer’s account representatives are employed to perform more than merchandising and sales. They also are employed with the specific understanding that they would be responsible for managing the merchandisers, which includes discharging them if necessary. It is clear that although the Employer’s TDMs or other managers interview and hire merchandisers, determine their terms and conditions of employment, and set their wage rates, the discharge of merchandisers is one of the specific duties assigned to the account representatives. Further, while merchandisers perform some of the same duties as the account representatives, they often work separately from them and their duties are not simply adjunct to the work of the account representatives. We find, therefore, that the account representatives exercise their supervisory authority in the interests of the Employer and not solely for their own convenience.⁹

⁹ *Gulf Bottlers, Inc.*, 127 NLRB 850 (1960), and the cases cited therein, are distinguishable. In *Gulf Bottlers*, the Board found driver-salesmen were not supervisors although they had the authority to hire, lay off, and discharge their helpers. However, the Board found that the helpers were hired for the drivers’ convenience. There, unlike the instant case, the drivers could secure the services of a helper by making arrangements directly with the helper without any participation by management; the drivers could pick their helpers anywhere; and it was the drivers who determined the number of hours the helpers worked and their wage rates. In addition, although the employer paid the helpers’ wages, part of those wages came out of the drivers’ pockets. There are no such facts in the instant case to conclude that the merchandisers were hired for the account representatives’ personal convenience. *Tiberti Fence Co.*, 326 NLRB 1043 (1998), in which the Board found that the disputed foremen were not statutory supervisors, is also distinguishable. In *Tiberti*, the wages paid to the helpers were subtracted from the foremen’s piece rate earnings and, therefore, the recommendation that a helper receive a wage increase was a recommendation that the helper receive a greater portion of the foreman’s own pay. The Board concluded that the role played by the foremen in recommending wage increases for their helpers was not carried out in the interest of the employer and instead was in the foremen’s own interest to ensure a harmonious relationship between themselves and their helpers, and to

Thus, in view of the foregoing, we find that account representatives who have assigned merchandisers possess the authority to discharge the merchandisers and that such authority is sufficient to find them to be statutory supervisors.¹⁰ As noted above, the evidence establishes that all account representatives who have merchandisers assigned to them, or to their team, possess the same authority with respect to the discharge of the merchandisers. Contrary to the Regional Director, we do not draw a distinction between those account representatives who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such account representatives possess the authority to do so. Accordingly, we find that all account representatives who have merchandisers assigned to them or their team, are statutory supervisors as defined in Section 2(11) of the Act.

ORDER

The Regional Director’s decision is reversed in part and affirmed in part, and this case is remanded to the Regional Director for further action consistent with this Decision.

motivate the helpers to stay. Member Hurtgen, who dissented there, finds it unnecessary to distinguish *Tiberti*.

¹⁰ See *King Trucking Co.*, 259 NLRB 725, 729 (1981), in which the Board found, inter alia, that the disputed employee was a statutory supervisor because he was authorized to discharge employees.